1960

Wayne C. Close v. Harold G. Blumenthal and Virginia A. Blumenthal : Brief of Respondent

Utah Supreme Court

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In the Supreme Court of the State of Utah

WAYNE C. CLOSE,
Plaintiff and Respondent,

vs.

HAROLD G. BLUMENTHAL and VIRGINIA A. BLUMENTHAL,
Defendants and Appellants.

CASE NO. 9196

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Respondent does not entirely agree with the appellants' Statement of Facts.

According to the terms of the earnest money agreement and offer to purchase, the purchase price was to be paid and the land was to be conveyed on June 1, 1959. An agent of the respondent called Harold Blumenthal on June 1, 1959, after the contract had been sent to the agent's office for the transaction to be closed. (R. Tr. 5) He again communicated with Mr. Blumenthal on June 15th. (R. Tr. 5) On

June 15th, the appellants notified the respondent that they would not perform the contract. (Tr. 3, 4, 5) The appellants were served with summons on the 20th day of June, 1959, and the complaint was filed on June 24, 1959. (R. 3)

For the purpose of considering this appeal, it is necessary to refer to the pleadings. Briefly, the complaint alleged that the respdondent was the owner of the property. It alleged the existence of Exhibit "A". It alleged "that on June 1, 1959, plaintiff was ready, willing and able to deliver to the defendant a deed to the premises pursuant to the agreement and offered to do so, but the defendants, then and ever since, have refused to accept the same and to pay the amount of purchase money as specified in said agreement." (R. 3) The complaint alleged the respondent was and always had been and was still ready, willing and able to perform the agreement, and it prayed for specific performance, together with attorney's fees and interest.

The appellants filed an answer that is as follows:

> "Comes now the defendants in the above entitled action and in answer to plaintiff's complaint on file herein admit, deny and allege as follows:
>
> For a First Defense.
>
> The defendants deny that the plaintiff's complaint on file herein states the facts sufficient to constitute a cause of action.
>
> For a Second Defense.
>
> The defendants deny each and every allegation contained in plaintiff's complaint." (R. 9)

On the 29th day of June, 1959, the appellants filed an amended answer. Said amended answer reads as follows:

"Come now the defendants in the above entitled action, and leave of court having been first had and obtained, filed this, their Amended Answer to plaintiff's complaint on file herein.

For a First Defense.

The defendants deny that plaintiff herein states facts sufficient to constitute a cause of action.

For a Second Defense.

1. The defendants allege that at the time of the execution of the purported earnest money agreement that the said Wayne C. Close was not the owner and entitled to possession of the said premises, as described in plaintiff's complaint.

2. That the said earnest money receipt, and offer to purchase, was approved by Wayne C. Close, plaintiff herein, but was not approved by his wife, the said Wayne C. Close being then and there a married person, and that said earnest money receipt, offer to purchase and approval, is not a complete contract under the laws of the State of Utah.

3. That the said wife of Wayne C. Close did not waive her statutory interest in and to the said property." (R. 12).

On July 30, 1959, a pretrial conference was held. Pursuant to the pretrial conference, the court issued a pretrial order. In the pretrial order, the court reserved four issues. They were: (1) Is the remedy of specific enforcement on a contract for the sale of real property available to a vendor? (2) Can a vendor who is a married man maintain an action for specific performance upon a contract for the sale of real property when the contract does not bear the signature of his spouse? (3) If questions 1 and 2 are

answered in the affirmative, what amount is a reasonable attorney's fee to be awarded the plaintiff according to the terms of Exhibit "A"? And the court thereafter reserved the additional question as to whether the remedy of specific performance of Exhibit "A" was available to the plaintiff when the money paid as recited in Exhibit "A" had not been returned to the vendee.

No objection was made by the appellants to the pretrial order. Trial of the matter was had on November 10, 1959. At the commencement of the trial, it was stated by counsel for the respondent that the issues of law reserved at the pretrial hearing had been resolved in favor of the respondent. (Tr. 2) With this statement the court agreed. It was further stated by counsel for the respondent that the only issue remaining to be resolved at the trial was the amount of the attorneys' fee to be awarded to the respondent. (R. 2) At pages 2 and 3 of the record, the following appears:

> "MR. YOUNG, JR.: The pretrial went further and said if these two questions are answered in the affirmative, then the only remaining issue is the issue of what amount is a reasonable attorney fee to be awarded to the plaintiff.
>
> THE COURT: Yes, that is correct.
>
> MR. YOUNG, JR.: So that at this juncture we have no problem of title.
>
> MR. HATCH: No.
>
> MR. YOUNG, JR.: There isn't any problem of tender of performance on the part of the plaintiff.
>
> MR. HATCH: I presume the plaintiff and the defendants can stipulate that the defendants informed the

plaintiff that they would not perform and did not perform.

MR. YOUNG, JR.: On or about the 15th day of June of this year.

MR. HATCH: Yes, sometime between the first and the 15th of June, and that there was no offer of return of the purchase money by the vendee and the vendor—the earnest money—in the sum of $500.00, nor any portion thereof, nor was there an offer of return."

On the 22nd day of December appellants made a motion to amend the Findings of Fact. (R. 43) In their motion the appellants asserted that the court should have found that respondent was ready, willing and able to perform the contract so far as his own personal interest was concerned. (R. 44)

Appellant erroneously states that the deed which respondent had at the pretrial was introduced in evidence at the hearing on the motion to amend the Findings of Fact. The deed was offered, but the offer was refused. (Proceedings on Objection to the Court's Finding of Fact page 5).

STATEMENT OF POINTS

POINT 1

THE REMEDY OF SPECIFIC PERFORMANCE IS AVAILABLE TO A VENDOR ON A CONTRACT FOR THE SALE OF REAL PROPERTY.

POINT II

THE CONTRACT PROVISIONS IN QUESTION ENTITLE RESPONDENT TO SPECIFIC PERFORMANCE.

POINT III

THE PLEADINGS JUSTIFY THE FINDING THAT THE RESPONDENT WAS READY, WILLING AND ABLE TO PERFORM.

POINT IV

THE PRETRIAL CONFERENCE AND THE RECORD OF THE TRIAL SUPPORT THE COURT'S FINDING THAT RESPONDENT WAS READY, WILLING AND ABLE TO PERFORM.

ARGUMENT

POINT 1

THE REMEDY OF SPECIFIC PERFORMANCE IS AVAILABLE TO A VENDOR ON A CONTRACT FOR THE SALE OF REAL PROPERTY.

This Court has recently considered two cases, in each of which cases an agreement identical to the one sued upon was the subject of the action. Respondent refers to Andreason v. Hansen, 335 P2d 404, and the case of Robert L. McMullin v. Lynwood F. Shimmin and Jacquie Shimmin, _____Ut._____, _____P2d_____.

Both of these cases assume, though the direct question was not involved, that an action for specific performance of a contract for the sale of real property will lie in behalf of the vendor. This is a statement which was disputed by the appellants in the District Court, but which is a well known rule of law which has been adopted by the Supreme Court of the State of Utah. Imlay v. Gubler, 298 Pac. 383; American Law Institute, Restatement of the Law of Con-

tracts, Sec. 360; 9 American Jurisprudence, 110, Sec. 94; 58 Corpus Juris, 917, Sec. 76; 3 American Law of Real Property 173, Sec. 11.68.

POINT II

THE CONTRACT PROVISIONS IN QUESTION ENTITLE RESPONDENT TO SPECIFIC PERFORMANCE.

The contract provision at issue in this case is well known to this Court. It is the same provision that was in question in the case of Andreason v. Hansen, 335 P2d 404, and in the case of Robert L. McMullin v. Lynwood F. Shimmin and Jacquie A. Shimmin, ____Utah_____, _____P2d_____.

Neither the Andreason case nor the McMullin case affords any precedence for this case. The Andreason case was a case in which the action was for damages. The McMullin case prayed for damages or specific performance in the alternative. Andreason v. Hansen finds support in the cases cited by appellants, Cooley v. Call, 61 Ut. 203, 211 Pac. 977; Rose v. Garn, 56 Ut. 533, 191 Pac. 645, both support the reasoning of the Andreason case. So also do the Utah cases of K. P. Mercury Company v. Jacobsen, 30 Ut. 115, 83 Pac. 724, and Skeen v. Smith, 75 Ut. 464, 286 Pac. 633. See also 3 American Law of Real Property, 172, Sec. 11.67, where the following authorities are cited: Armstrong v. Irwin, 26 Ariz. 1, 221 Pac. 222, 32 ALR 609 (1923); Schofield v. Tompkins, 95 Ill. 199, 35 Am Rep. 160 (1880); Selby v. Matson, 137 Iowa 97, 114 N. W. 609, 14 LRA (N. S.) 1210 (1908); Beck v. Megli, 153 Kan. 721, 114 Pac. 2d 305, 135 ALR 1124 (1941); Asia Inv. Co. v. Levin, 118 Wash. 620, 204 Pac. 808, 32 ALR 578 (1922). See annotations 52 ALR 1532 (1925), 97 ALR 1494 (1935).

It is important to note that all three of the Utah cases cited by appellants to support Point No. I of appellants' brief were distinguished by the Utah Supreme Court in Imlay v. Gubler, supra, when the action was one for specific performance.

The fact that the deposit money was retained by the respondent should not preclude the respondent from suing for specific performance. By the doctrine of the Andreason case, a vendor on a contract for the sale of land, which contract has been breached, has the same rights as the vendor under the Imlay v. Gubler doctrine. By a necessary implication of the court's holding in the Andreason case, if the seller chooses to return the earnest money received, the seller can then sue for damages. If he does not return the money, then he has elected under the provision to treat the money paid as the earnest money as the extent of his damage. The fact that the seller had an option to treat the money paid as damages ought not to affect the seller's right to specific performance.

It is the general rule that a contract provision providing for liquidated damages at the option of the vendor does not affect the right of the vendor to bring an action for specific performance. Imlay v. Gubler, supra; 55 American Jurisprudence, Vendor and Purchaser 905, Sec. 513; 49 American Jurisprudence, Specific Performance, 61, Sec. 45; 32 ALR 584; 98 ALR 887. The American Law Report Annotation in 98 ALR at page 888 cites Imlay v. Gubler in support of this rule.

It is also true that the retention of the deposit is not inconsistent with an election to require the vendee to perform the contract. Respondent has not been able to find

any case in which the vendor was required to refund the amount paid as a condition to maintaining an action for specific performance.

POINT III

THE PLEADINGS JUSTIFY THE FINDING THAT THE RESPONDENT WAS READY, WILLING AND ABLE TO PERFORM.

Under the pleadings of this case there is no issue concerning the ability of the respondent to perform or his timely offer to do so.

The answer filed by the appellants denied each and every allegation contained in the complaint. (R. 9) The answer is set forth on page two of this brief. The answer contains a first defense and a second defense.

On July 30, 1959, the appellants filed an amended answer. The amended answer made no reference to the answer on file. The amended answer purported to be a full and complete answer to the complaint. The amended answer contained a first defense and a second defense. There are no denials in the amended answer of any allegation contained in the complaint.

Since the amended answer contained no denials of any allegation in the complaint, it admitted that the respondent was ready, willing and able to perform the contract and offered to do so. The complaint so alleges and according to Rule 8(d) URCP, the allegations in the complaint are admitted.

"It is often stated as a rule that an amended answer supercedes the original answer and that the original is no part of the record, from which it follows that all mo-

tions in demurrers relating thereto accompany it." 1 Bancroft's Code Pleading, page 811, citing Welsh v. Bardshar, 137 Cal. 154, 69 Pac. 977; Miles v. Woodard, 115 Cal. 308, 46 Pac. 1067; Schneider v. Brown, 85 Cal. 205, 24 Pac. 715; Pfister v. Wade, 69 Cal. 133, 10 Pac. 369; Everding and Farrell v. Gebhardt Lumber Company, 86 Ore. 239, 168 Pac. 304; Wells v. Applegate, 12 Ore. 208, 6 Pac. 770. See also Cooley v. Frank, 68 Wyo. 436, 235 P2d 446; Schaeffer v. Schaeffer, 175 Kan. 629, 266 P2d 282.

Respondent has been unable to find any Utah cases that discuss the subject. The case of Peterson v. Union Pacific Railroad Company, 8 Pac. 2d 629, discusses the affect of an amended complaint.

POINT IV

THE PRETRIAL CONFERENCE AND THE RECORD OF THE TRIAL SUPPORT THE COURT'S FINDING THAT RESPONDENT WAS READY, WILLING AND ABLE TO PERFORM.

The pretrial order and the proceedings upon the trial support the findings of the court that the respondent was ready, willing and able to perform the contract.

A pretrial order was made by the court following the pretrial hearing. The pretrial order states that parties agreed that Exhibit "A" had been executed by the parties, and it reserved three issues to be resolved upon the trial. They were: (1) Is the remedy of specific performance of a contract for the sale of real property payable to a vendor? (2) Can a vendor who is a married man maintain an action for specific performance upon a contract for the sale of real property when the contract does not bear the

signature of his spouse? (3) If questions 1 and 2 are answered in the affirmative, what amount is a reasonable attorneys' fee to be awarded the plaintiff according to the terms of Exhibit "A"?

Subsequently, the court reserved the additional question of law, "As to whether the remedy of specific performance on Exhibit "A" is available to the plaintiff when the money paid as recited in Exhibit "A" has not been returned to the vendee."

Upon the trial of the matter, the appellants admitted that the respondent had good title. (R. 3)

In response to the statement by the respondent's counsel that there was no issue as to the tender of performance, appellants' counsel said, "I presume the plaintiff and the defendant can stipulate that the defendant informed the plaintiff that they would not perform, and did not perform."

> "MR. YOUNG, JR.: On or about the fifteenth day of June of this year.
>
> "MR. HATCH: Yes, sometime between the first and the 15th of June, and that there was no offer of return of the purchase money by the vendee and the vendor—the earnest money—in the sum of $500.00, nor any portion thereof, nor was there an offer of return." (Tr. 3)

CONCLUSION

Respondent respectfully submits that the judgment should be affirmed. We submit that respondent had the right under the contract to require specific performance. We further submit that the record supports the court's find-

ing that respondent was ready, willing, able, and offered to perform.

Respectfully submitted,

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